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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1945

CECIL I. HUST,

Petitioner and
Plaintiff-Respondent below,

against

MOORE McCORMACK LINES, INC.,

Respondent and
Defendant-Appellant below.

PETITION FOR PERMISSION TO FILE BRIEF *AMICUS CURIAE*, and BRIEF *AMICUS CURIAE*

SILAS B. AXTELL,
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New York City.

MYRON SCOTT,
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To—THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The undersigned, as counsel for various complainants, respectfully petitions this Honorable Court for leave to file the accompanying brief amicus curiae on the filed consent of the attorneys for the petitioner, Cecil I. Hust and the respondents in the above entitled petition.

Your petitioner has read the petition of Cecil I. Hust and the brief submitted by his attorneys in support of his petition for writ of certiorari herein, and concurs and endorses the arguments and reasons therein set forth in favor of the granting of said petition.

Your petitioner, Josephine Fontao, administratrix of the estate of Jose Fontao, deceased, alleges that she is the plaintiff in a cause of action in the United States District Court for the Southern District of New York, Civ. 24-156, which will be reached for trial within sixty (60) days. That her husband, the chief officer of the S. S. "Agwiprince", a vessel owned, operated and controlled, according to the answer of the defendant named, "Agwilines", was killed through the negligence of the operators of said vessel on the high seas on the 1st of November, 1942. That since the case was commenced she has been informed that although the defendants admit ownership, operation and control of the vessel, they will contend that her husband was actually employed by the W. S. A. and the United States of America, under a "General Agency Agreement" with the defendant named. She further alleges that while her action at common law was commenced on the 2nd of February, 1944, within two years after the death of her husband, more than two years has elapsed since his death, and had elapsed before she learned, or before her attorney had been informed that such a contention of employment by the W. S. A. could be made, and she believes that the Statute of Limitation might be effective as a defense and prevent her from now filing a libel against the United States.

She alleges that her husband was lost through the negligent navigation of the S. S. "Agwiprince" and by reason of the unseaworthy condition of the said vessel, in that certain heavy deck cargo had become loosened in bad weather, and the fore-peak and after-peak of said vessel had become filled with water in bad weather, so as to cause said vessel to be down by the head, and that her husband was injured so seriously that he died on the said date, while in the performance of his duties, and through the negligent act of the master and officers and navigators of said ship, in that they failed to take proper steps to protect him, while he was exposed to the violence of the

seas in making an inspection of the deck cargo on the fore-peak of the vessel as aforesaid.

For these reasons, your petitioner deems it important that the question of her right to pursue her action at common law be determined by the Supreme Court of the United States at an early date.

That your petitioner, Earl C. Mander, a mariner, and second officer of an American vessel, the S. S. "John Motley" alleges that he met serious injury on the 18th of August 1943, while employed by the American Export Line, Inc., owners and operators of said vessel.

While your petitioner has filed a libel in a cause of action based upon the negligence of the respondent, the American Export Lines, Inc. and the United States of America within the two years permitted under the Suits in Admiralty Act, he believes he is entitled, as a citizen of the United States to a trial by jury, and your petitioner alleges that he desires as a citizen of the United States, to prosecute his action at common law and to have a jury trial, but he does not wish to waste the time of the trial court or of the Appellate Court in obtaining a judgment at common law which might later be set aside on the ground that his sole remedy was under the Suits in Admiralty Act.

Your petitioner alleges that on the 18th of August, while obeying orders of the master of the ship to supervise the uncovering of a deep tank in the ship, he was knocked unconscious and seriously and permanently injured by the explosion of gas formed by a mixture of air, water and calcium carbide, and this explosion occurred by reason of the negligence of the American Export Lines in permitting and directing that this particular kind of cargo (of a dangerous character) be carried in a sealed compartment in violation of well established precautions, and this petitioner therefore petitions this court to grant a writ of certiorari to Cecil I. Hust, because he thinks

that the determination of the rights of the petitioner Hust, will decide the case whether or not your petitioner Earl Mander has a right to try his case at law under the Jones Act.

Your petitioner Jeannette Bitcon, widow of Roy E. Bitcon, alleges that she was duly appointed administratrix of the estate of her husband at Nassau County, Long Island, N. Y. on July 9th, 1945. That she has filed a libel and complaint against the United States of America, and the Luckenbach Steamship Company for damages sustained through the death of her husband who was employed by the firm of Sullivan Dry Dock and Repair Company at a salary of $4600.00 a year, and who was caused to fall from an inadequate and defective ladder furnished to him by the respondent on the 3rd of May 1945, at the foot of Fifty-second Street, Brooklyn, N. Y.

Your petitioner is informed and believes that the circumstances of the death of her husband involving the determination of certain questions of fact, credibility of witnesses, etc. would be that it would be to her advantage as a litigant to have this cause of action determined by a jury of citizens of the United States. She has, on the advice of her attorney, caused a libel to be filed in the United States District Court, Southern District of New York, and she alleges and believes that she is entitled to a trial by jury since the amount of her claim exceeds Twenty ($20.00) Dollars (being a claim of One hundred thousand ($100,000.00) Dollars), by reason of the Seventh Amendment of the Constitution of the United States, and she is informed and believes that Congress, in passing the Jones Act on June 5th, 1920, gave to seamen and their dependents, the right of an election to enforce whatever rights they might have under the said Act, and to have a jury trial as provided by law, and she is informed and believes that no Act of Congress has been passed since then, which specifically or necessarily abrogated or modified that right.

She therefore petitions this Court to grant the petition of the above named Cecil Hust, for the reason that she is advised and believes that the determination of the rights of said Hust, will be determinative of the question of whether she also is entitled to a remedy at common law.

Your Petitioner, THE FRIENDS OF ANDREW FURUSETH LEGISLATIVE ASSOCIATION, alleges that it is an unincorporated non-profit membership organization, organized under and existing for the purpose of aiding and encouraging the principles of Andrew Furuseth, who was a leader of seamen from 1885 to the time of his death in 1938. That, as presumably this Court knows, Mr. Furuseth advocated the passage of the La Follette Seamen's Act, which freed seamen from bondage and extended in its terms and by the intent of Congress to foreign vessels, the purpose of improving the status of mariners as to earnings, living conditions on board, and freedom from criminal and inhuman punishment, and for arrest and imprisonment for desertion or breach of contract.

ANDREW FURUSETH, together with his associates and advisors, framed the LaFollette Seamen's Act, including Section 20, a provision which reads as follows:

> "Sec. 20—In any suit to recover damages for any injury on board a vessel, or in its service, seamen having command shall not be held to be fellow-servants with those under their authority."

This Section 20 was found deficient by the Supreme Court of the United States (see *Chelentis* v. *Luckenbach*, 247 U. S. 372). After the decision of the said Supreme Court in the said *Chelentis* case, Section 33 of the Jones Act was passed, and because the right to a jury trial was threatened in another case then pending (*Berg* v. *Philadelphia & Reading*, 274 Fed. 534), the words:

> "Any seaman at his election may maintain any action for damages at law with the right of trial by jury."

were written into the Statute.

The Jones Act, itself, making the Railway Servants' Act applicable to mariners, and abolishing as it did the defenses of assumption of risk, and contributory negligence as complete defenses, has become known (as it was intended by Congress) to be a safety measure.

Negligence is necessarily a comparative thing, depending upon the knowledge of available safety devices of the employer. It has been considered by Mr. Furuseth and by his associates (for the most part merchant seamen and officers of the United States) who are members of this Association, that the Jones Act is a safety measure which is effective in saving human life, in preventing men from becoming maimed, seriously and permanently injured and killed. That it saves the people of the United States heavy burdens in taxes for the maintenance of dependents, and tends to raise the standard of living of people of these United States. The determination of damages by juries has the effect of causing Insurance Companies, their agents and inspectors to be much more alert in the maintenance and repair of vessels, in the use of better and sturdy appliances, and in the use and promulgation of rules and regulations of conduct of the work of a mariner, which is inherently dangerous anyway, and it is therefore a law which is desirable from the point of view of public interest.

WHEREFORE your petitioner respectfully petitions this Honorable Court for leave to file the accompanying brief amicus curiae, and that the judgment of the Oregon Supreme Court should be reviewed and reversed.

SILAS B. AXTELL,
Attorney for Petitioners,
Office and P. O. Address,
15 Moore Street,
New York City.

STATE OF NEW YORK,
CITY OF NEW YORK,
COUNTY OF NEW YORK, } ss.:

SILAS B. AXTELL, being duly sworn deposes and says that he is the Attorney for the co-petitioners named in the foregoing Petition; that he has read the same, and knows the contents thereof, and that the same is true of his own knowledge except as to the matters therein stated to be alleged upon information and belief, and as to those matters he believes it to be true.

SILAS B. AXTELL.

Sworn to before me this
27th day of November, 1945.

LUCIEN V. AXTELL,
Attorney and Counsellor-at-Law,
Residing in Queens County.

Clerk's No. 2.
New York County Clerk's No. 10.
Office 15 Moore Street.
New York City.
Commission expires March 30, 1946.

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BRIEF OF *AMICUS CURIAE*

Preliminary Statement

There is an important question of law in the Hust case, which directly effects the rights of various complainants in suits which they have pending, and for which your petitioner is attorney of record, as was made to appear from the foregoing brief statement of their cases in the Petition.

Question

The important question in the Hust case which directly effects the rights of your petitioners on the pending cases above described, is the right of a seaman to sue at com-

mon law, a steamship operator, operating under a General Agency form of contract with the War Shipping Administration, in view of the provision of Public Law 17.

POINT I

Public Law 17, 57 Stat. 45, 50, U. S. C. A. App. Section 1291, not only does not directly modify or amend the provisions of the Jones Act, written specifically for the purpose of granting to seamen the right of election to submit issues of fact to a jury, but shows continuing intent to perpetuate those provisions.

To assume that Congress would deliberately take from seamen and the Courts the right of having their damages fixed by jurors of their fellow citizens, would require strong statutory intent, plain and unmistakable, which is not present in the instance of Public Law 17.

The intent of Public Act 17, would seem to be a reassurance to seamen that their common law remedies, saved to them from the beginning were still preserved to them notwithstanding the state of war and changes in shipping administration.

The Seventh Amendment to the United States Constitution; the saving clause in Section 9 of the First Judiciary Act of 1789,—1 Stat. 76, now Judicial Codes Section 24 and 256, as these remedies have been reaffirmed, and the rights of seamen under them broadened by Section 33 of the Jones Act, 46 U. S. C. A. 688.

At the start, the Statute states generally, that officers and members of the crew employed by the War Shipping Administration, shall have all the rights under the law applicable to citizens of the United States, employed as seamen on privately owned and operated American vessels.

The Act then makes a single exception as to compensation claims for personal injuries, or as the Act states:

"CLAIMS ADMINISTRATION DISALLOWED" and states that these claims shall be enforced under the Suits in Admiralty Act.

Here, by the clearest intendment, the common law remedies for other claims for personal injuries, that is, claims other than compensation claims, were saved to the officers and members of the crew.

The Oregon Supreme Court however, in the Hust opinion has rehearsed this Statute, and the long and involved House Report No. 107 (1943 A. M. C. 617) which accompanied it, and has arrived at the conclusion that the seamen were intended to be treated as employees of the War Shipping Administration only, and limited to the remedies under the Suits in Admiralty Act.

The conclusion of the Oregon Supreme Court on this point of law is directly opposite to that of Judge Levy (March 1944). The Oregon Court endeavors to distinguish the Gau case on its facts.

POINT II

The Hust case presents the defense of a steamship operator to a seaman's suit at common law for personal injuries, by arguments based upon an agency device which requires some study. A divided agency was created leaving to the operator an agency in matters of operations.

AN AGENCY IN MATTERS OF OPERATION.

The Agency device is found in Article 3A (d) of the General Agency Agreement between the operator and the War Shipping Administration which provides:

> "The General Agent shall procure the master of the vessels operated hereunder, subject to the approval of the United States. The Master shall be an agent and employee of the United States, and shall have and exercise full control, responsibility and authority

with respect to the navigation and management of the vessel. The General Agent shall procure and make available to the Master for management by him, the officers and men required by him to fill the complement of the vessel, * * *."

Article 3A (d) of the General Agency Agreement gave merely a limited field of control to the War Shipping Administration. The operator had the whole wide field of merchant seamen from which to make its selection, but it was only as to those the operator selected that the War Shipping Administration reserved the right of approval.

It is true that the agreement did provide that the Master shall be an agent and employee of the United States for some purposes only, to wit: navigation and management of the vessel. IT DID NOT SAY THAT THE MASTER SHOULD NOT ALSO BE AN AGENT OF THE OPERATOR FOR OTHER PURPOSES, to wit: operation, or even for the same purposes of navigation and management.

There is a *non sequitur* in stating that because one of the parties stipulates that a person shall be his agent for some purposes, that he is therefore his agent for all purposes, and not the agent of the other party for any purpose.

Take for example the work of the ordinary interpreter (*Miller* v. *Lathrop*), 50 Minn. 91; N. W. 274 (1892), who is agent for both parties at the same time. There is nothing new about it.

Even as to the Master there was a divided agency created here. The jump from a reserved limited agency for the Government, to an assertion that other officers and members of the crew were employees of the United States because the operator referred them to the Master, and were in turn hired by the Master, is one that is not warranted.

The reason for the divided agency is apparent. Sufficient reason existed in the necessity for secrecy and

security control. There were certain very definite sea routes which the Navy undertook to guard. There were certain bases where supplies were to be delivered which the armed forces undertook to defend. There were certain procedures to be followed enroute, and at ports, such as blackouts, zigzags, variation in speed, etc. The orders for the navigation and management of the ship in these respects must necessarily come from the Armed Forces directly to the Master of the ship.

But otherwise, did it mean that the War Shipping Administration was committed to the operation of the ship? Did it mean that the War Shipping Administration was to decide whether a chain or a rope was to be used to guard an open hatchway, or what kind of light should be maintained in the darkened forepeak of the ship?

POINT III

A construction of the General Agency Agreement which holds the private operator liable for injuries to seamen received in the operation of the vessel is the only construction which gives meaning to the agreement.

Considering further the arrangement between the parties themselves for the protection of the officers and members of the crew, we come to Article 16A of the Agency Agreement, noticed by the Oregon Supreme Court in the Hust opinion (1945 AMC. 527), in which the United States agrees to indemnify the general agent against claims asserted for injuries to persons arising out of the operation of the vessel.

This language merely follows the controlling section of the *Merchant Marine Act of 1936*, 46 U. S. C. A. Section 1202, which requires the operator to carry insurance against personal injuries, provided that some or all of such insurance risks may be underwritten by the Commission.

Now, it is clear that if the officers and members of the crew were not agents of the operator, then the provision for insurance by the operator would be entirely ineffective, because there would be no insurable interest. (*Century Ins. Co. Ltd.* v. *Northern Ireland Co.*; 1942, A. C. 509.)

Furthermore, there is a vast difference in the shifting of the risk as in the case of re-insurance by the Government and the prevention of risk in the direct insurance by the operator. (See *Vicarious Liability and Administration of Risk*, 38 Yale Law Journal 584, 601.) As explained, *supra*, it was the prevention of risk that was the motivating force behind the passage of the Jones Act.

By holding officers and members of the crew agents of the operator, there is both a distribution of the social risk and cost, and what is more important, there is the long range factor of prevention of risk. By holding the seamen agents of the United States on the other hand, there would be no prevention of risk because in that event, there would be no loss to the operator to be guarded against in future cases by the person most able to guard against them.

POINT IV

The private operator did not go to war.

Realizing the peril in the divided agency created the operator has gone all out and secured from the Oregon Supreme Court, the holding expressed in the following words, 1945 AMC. 523:

> "* * * The agreement was made in time of war; the vessels operated under it were and still are, as we judicially know, practically in the military service of the United States; and it is not to be supposed that in those circumstances the War Shipping Administration contemplated anything less than that they should be under the complete and exclusive control of the United States."

This case is not like that of an operator of a private taxicab, whose cab is commandeered by a policeman in pursuit of a criminal. *Balinovic v. Evening Star,* 113 F. (2) 505; 72 App. Div. 176 (1940).

The terms of the operation in the Hust case were strictly private and proprietary in nature, and the subject of contract. *The Merchant Marine Act of 1936,* 46 U. S. C. A., Sections 1171 and 1191, clearly define the private profit motive of the business.

There is an "operating differential subsidy" for vessels in foreign service (Section 1171) and there is a regulated profit of ten per cent on capital employed, with an additional profit of one-half of the excess over that amount (Section 1191).

The operator itself did not go to war. It was merely a corporate entity, a legal fiction, dedicated to the cause of private profit for its stockholders and committed by contract with the War Shipping Administration to the dispatch of duties in the operation of the vessel from which it made its profit.

By attempting to shift its duties of operation to the ship, and from the ship to the War Shipping Administration, the operator merely side-steps the issue. In the same way it side-steps the issue by procuring a master for approval of the United States, and then procure the other officers and members of the crew for the master's approval, and then saying that these men are not its servants, even though it retains the role of paymaster and the contractual duty to man, victual, equipment, supply and maintaining the vessel.

The injury received in the fall through the unlighted unguarded hatchway was an operating loss for which the operator was responsible and for which it was liable. *Brady* v. *Rosevelt,* 317 U. S. 575, and for which the seaman had a common law remedy preserved to him even in war time by Public Act 17. The jury correctly decided that the operator was responsible and liable.

CONCLUSION

The judgment of the Oregon Supreme Court in the *Hust* case should be reversed.

Respectfully submitted,

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